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No. 117

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IN THE

Supreme Court of the United States

October Term, 1952.

DEENA PRODUCTS COMPANY, - - Appellant,

vs.

UNITED BRICK & CLAY WORKERS OF AMERICA,
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and
THE AMERICAN FEDERATION OF LABOR, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

AND

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JAMES G. WHEELER,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Attorney for Appellant.

WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

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The petitioner, Deena Products Company, prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

No opinion was written by the District Court which directed a verdict for the defendants at the conclusion of all of the evidence in a jury trial. The opinion of the United States Court of Appeals for the Sixth Circuit handed down February 18, 1952, has not yet been printed. It is printed as an appendix to the supporting brief.

JURISDICTION.

This is an application for review of the final decree of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court of the United States for the Western District of Kentucky, in an action instituted by appellant to recover damages founded on Title 29, Section 187 U.S.C.A., making secondary boycotts unlawful, and giving to

> "Who ever shall be injured in his business or property"

by reason of such boycotts, a right to sue for damages.

QUESTION PRESENTED.

Appellant, an Illinois corporation, manufactured lamps. A subsidiary, Deena Artware, a Kentucky corporation, manufactured at Paducah, Kentucky, the pottery bases of such lamps, all of which were sold and to be sold to appellant. The subsidiary sought to

enlarge its facilities at Paducah, so that the complete assembly of the lamp could be completed in a new plant to be constructed by an independent contractor near the pottery base manufacturing plant. This construction was prevented by an unlawful secondary boycott. As a result, appellant sustained losses accurately shown on account of packing, unpacking and freight due to the necessity of shipping unfinished lamp bases to other points to be manufactured into completed lamps. Affirming the District Court, the Court of Appeals held that any damages suffered by the appellant were entirely dependent upon certain contractual relations with the subsidiary "which contractual relations did not exist." It held that because a contract between appellant and its subsidiary to sell the output of the subsidiary was not shown by proof, there could be no recovery. The decisions of the lower court involve the construction of the words of Section 187, Title 29, U.S.C.A.:

> "Who ever shall be injured in his business or property by reason of any violation of Subsection (a) of this section, may sue therefor in any District Court of the United States * * *."

If the provisions of the Labor Management Relations Act prohibiting the use of secondary boycotts are to be enforced, this petition presents an important question of Federal law, which has not been, but should be, settled. The decision of the Court of Appeals is in direct conflict with the decisions of this court and of the courts of other circuits construing identical lan-

guage in the Sherman Anti-trust Act, which provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States * * *."—*15 U.S.C.A. 15.*

The same language is used in Section 72, Title 15, a part of the statutes for the prevention of unfair methods of competition and perhaps in other federal statutes which we have not examined. In construing the Sherman Anti-trust Act, this Court has found that it is permissible to arrive at damages consisting of net profits lost if a reasonable basis of computation is afforded. *Eastman Kodak Company* v. *Southern Photo Materials Company,* 273 U. S. 359, 47 S. Ct. 400.

Where there is no uncertainty as to the fact of damage, the court has held that damages should not be refused because the exact amount cannot be shown with certainty. *Story Parchment Company* v. *Paterson Parchment Paper Company,* 282 U. S. 555; 51 S. Ct. 248.

In *American Banana Company* v. *United Fruit Company,* 213 U. S. 347, 29 S. Ct. 511, the court said in substance that it was not necessary to aver injury to an existing business, since it was as unlawful to prevent a person from engaging in business as it was to drive a person out of business. Courts of Appeal of other circuits have held that the language "any person who shall be injured" includes persons who have

no contract with the wrongdoer, but only an expectation of future dealings with him.

> "The absence of any contract obligation gave the defendant no more immunity from that tort than from any other tort."—*Vines* v. *General Outdoor Advertising Company,* 2d Cir., 171 F. 2d 487.

It is immaterial whether the unlawful combination was entered into before or after the plaintiff commenced to do business. It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business. *Pennsylvania Sugar Refining Company* v. *American Sugar Refining Company,* 166 F. 254; *Roseland* v. *Phista Mfg. Co.,* 7th Cir., 125 F. 2d 417.

In the Labor Management Relations Act, Congress used language, which had already been construed by the courts. It did not limit the right of recovery to employers of the boycotting unions members, or to parties to affected contracts. A question of practice considered by the Court of Appeals will also be discussed in the supporting brief filed herewith.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued.

JAMES G. WHEELER,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Attorney for Appellant.

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STATEMENT.

Deena Products Company sued the unions to recover damages sustained on account of a secondary boycott, which caused a general contractor to abandon the construction of a new plant on land of its subsidiary in Paducah, Kentucky. This company, an Illinois

corporation, was engaged in the manufacture and sale of lamps. It owned a subsidiary, a Kentucky corporation, known as Deena Artware, which manufactured in Paducah, Kentucky, the pottery bases used in making lamps. Other processes of manufacturing were completed in its plant at Chicago. In order that the manufacturing processes might be completed in Paducah, Kentucky, the subsidiary entered into a contract with an independent contractor to construct a new plant near its Paducah pottery plant. The new plant would be separated from the pottery plant only by a fifty (50) foot right of way of a railroad company, on which a spur track to serve the new plant was located. After the foundation of the new plant had been constructed, the striking employees of the subsidiary, members of United Brick & Clay Workers of America, assisted by members of the other defendants, engaged in a secondary boycott, which stopped the construction. As a result of the loss of use of the new facilities by its subsidiary, appellant was required to bear the expense of packing, unpacking, freight and breakage of the lamp bases, which had to be shipped from Paducah to Chicago, for a period of ten (10) months. The evidence showed accurately that this loss amounted to $81,477.13. Another subsidiary corporation constructed at Arlington, Kentucky, a plant similar to that which had been planned for Paducah. After this construction, however, it was still necessary to incur loss on account of packing, unpacking, shipping and breakage, and this loss, at the time of the trial, had been $23,681.31. This resulted directly from the loss

of use of the improved facilities, the construction of which was prevented by the boycott. Deena Artware, the subsidiary, sued in the District Court to recover the costs incurred by it in the construction work which had to be abandoned. This appellant sued to recover the losses incurred by it on account of the increased costs of its product due to the loss of use of the improved facilities. Affirming the District Court, which directed a verdict for the defendants as to this appellant, the Court of Appeals held that it could not recover damages because no contract between the appellant and its subsidiary was introduced. The subsidiary recovered damages for the construction costs. There is no overlapping of the damages claimed by appellant, and the damages recovered by the subsidiary.

ARGUMENT.

"Whoever shall be injured * * *."

Deena Artware, the subsidiary, sold its entire product to the appellant. The loss of use of the improved facilities increased manufacturing costs and lessened profits. The loss was not speculative; it was shown accurately by the auditors for the appellant. This appeal involves the construction of *Section 303 (b) of the Labor Management Relations Act, Section 187, Title 29, U.S.C.A.*, which is as follows:

> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the

limitations and provisions of Section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Far from limiting the right of recovery to those engaged primarily in the labor dispute, the language used is clearly indicative of the purpose to outlaw the use of the secondary boycott, and make the labor organizations using this forbidden weapon responsible to *"whoever should be injured."* The right of action was based on broad language. It was not limited to parties to contracts. The Sherman Anti-trust Act provides that:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws, may sue therefor in any district court of the United States in the district in which the defendant resides * * *."—*15 U. S.C.A. 15.*

In the case of *H. T. Roseland* v. *Phister Mfg. Co., et al.,* 125 F. 2d 417, the U. S. Court of Appeals of the 7th Circuit, considered an action by a general sales agent against a manufacturer claiming that he had suffered damage by reason of a combination formed by other manufacturers of the same line. We quote from the opinion:

"The language of the statute is general and all-inclusive. It includes any person who shall be injured in his business or property. We assume

that the word business was used in its ordinary sense and with its usual connotations."

In *139 A.L.R.*, page 1017, following the report of the above case we find an annotation on *"who may be regarded as injured in his business or property within provisions of anti-trust acts as to persons who may recover damages resulting from violation of the acts."* The editor states that it is immaterial whether the unlawful combination was entered into before or after the plaintiffs commenced to do business. It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business. *Thomsen* v. *Union Castle Mail S.S. Co.*, 166 F. 2d 251, Second Circuit); *Pennsylvania Sugar Refining Company* v. *American Sugar Refining Co.*, Second Circuit, 166 F. 254. We quote from the opinion in the Sugar Refining case:

> "A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is 'injured' within the meaning of the Federal statute. He may be unable to prove substantial compensatory damages, but in stating the infringement of his legal rights he states a acuse of action at least for nominal damages, and may perhaps so state it as to call for exemplary damages."

See also:

American Banana Co. v. *United Fruit Co.*, 166 F. 261, affirmed 213 U.S. 347, 29 S. Ct. 511.

In *Vines* v. *General Outdoor Advertising Company,* 171 F. 2d 487, the Court of Appeals of the Second Circuit considered an advertising solicitor's claim that he was injured by the employer's withdrawal of an account, and that the withdrawal was made pursuant to an unlawful agreement in violation of the Anti-Trust Acts. It was disposed of by the lower court in a summary judgment in favor of the defendant. In reversing the court held that the Anti-Trust Acts give a right of action to any person injured in his business or property because of anything forbidden in the anti-trust laws. This includes persons who have no contract with the wrongdoer. We quote from the opinion:

> "The Anti-Trust Acts give a right of action to 'any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws'; and it has been repeatedly held that those are within this language who have been so injured though they have no contract with the wrongdoer, but only an expectation of future dealings with him. * * *
>
> * * * * * * *
>
> "The absence of any contract obligation gave the defendant no more immunity from that tort than from any other tort."

We have found no authority which would support the view that the language of 303(b) should be construed so as to limit the cause of action given to the employer, or to one having a contractual relation with the alleged wrongdoer, or with the employer.

We have stated above that the amount of loss sustained was accurately shown. The case should have been submitted to the jury, even if the damages could not be calculated with such absolute exactness. *Eastman Kodak Company* v. *Southern Photo Materials Company,* 273 U.S. 359; 71 L. Ed. 684; *Story Parchment Company* v. *Paterson Paper Company,* 282 U.S. 555, 51 S. Ct. 248.

In *Schatte, et al.,* v. *International Alliance of Theater Stage Employees, etc.,* 84 F. Supp. 669, affirmed 182 F. 2d 158, the District Court of the Southern District of California made this comment on the identical question involved:

> "Under Section 303 'whoever shall be injured' in his property or business may sue, if such injury is the result of any act committed in violation of Section 303 (a) without regard to the existence or non-existence of any contract."

Conceivably, any person, whether a party to a labor contract or not might be injured by the acts proscribed in Section 303(a). See also *Bigelow, et al.,* v. *R.K.O. Radio Pictures, et al.,* 272 U. S. 251, 66 S. Ct. 574. There is abundant authority for the right to recover for loss of use of property where the reasonable worth of such use may be shown with reasonable certainty.

Louisville and Interurban Railway Company v. *Schuester,* 183 Ky. 504, 209 S.W. 542.
Annotations, 4 A.L.R. 1350, 78 A.L.R. 912.
L. & N. Railroad Company v. *Blanton,* 304 Ky. 127, 207 S.W. 2d 133.

Pope's Admr. v. *Terrill,* 308 Ky. 263, 214 S.W. 2d 276.

Burnham v. *Dowd,* 217 Mass. 351, 104 N.E. 841, 51 L.R.A. 778.

15 Am. Juris. 537, 572, 573.

The Motion to Dismiss the Appeal.

Under Rule 60(b):

"(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment, the motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of Coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; 1 Dec. 29, 1948, eff. Oct. 20, 1949.[2]"—*Barron and Holtzoff, Federal Practice and Procedure,* Vol. 3, page 248.

Acting under the above rule, the District Court, in order to effectuate the desire and agreement of the parties that the companion cases of Deena Artware, referred to above as the subisidary, and Deena Products Company, against the same defendants, might be considered together on appeal, set aside and re-entered a final order overruling a motion for a new trial, so that the records and briefs in the two (2) cases might be filed before the Court of Appeals at the same time. Because this had the effect of extending the time for filing notice of appeal, the Court of Appeals held in substance that the District Court erred in making such an order. The two (2) cases referred to grew out of the same facts and proceeded concurrently until the Court directed a verdict against this appellant:

> "On December 11, 1950, in a discussion between the Court and counsel, the Court recalls the

> counsel for the defendant stating in the presence of the Court and counsel for plaintiff that such agreements would be made as were necessary to enable this action, #508, to proceed on appeal with action #477, Deena Artware, Inc. v. United Brick & Clay Workers of America."

The above is quoted from the order of December 11, 1950 (Tr., p. 517):

> "Sec. 1323. *Discretion of the Court.* Relief from a final judgment, order or other proceeding rests in the sound discretion of the court guided by accepted legal principles. The discretion should ordinarily incline towards granting rather than denying relief, especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue. Equitable priniciples may be a guide in administering relief. In the absence of an abuse of discretion, the trial court's action is not reviewable on appeal."—*Barron & Holtzoff Federal Practice and Procedure,* Vol. 3.

In the case of *Hill* v. *Hawes,* 320 U.S. 520, 64 S. Ct. 334, the rule was made applicable under circumstances very similar to those under consideration here. Under the rules of the Court of Appeals of the District of Columbia, it was necessary to take an appeal within twenty (20) days after the rendition of the final judgment. Because the Clerk failed to notify the parties of the entry of the judgment, as provided by Rule 77 (d), the court vacated the judgment after the time for appeal had expired, and ordered a new judgment

entered. The Supreme Court held that the time for appeal would properly be measured from the date of the new judgment. We quote from the opinion:

> "Second. It goes without saying that the district court could not extend the period fixed by Rule 10. The respondent urges that the vacation of the judgment of May 7, and the entry of a new judgment on June 13, amounted merely to an attempted extension of the time for appeal; that judgment was duly entered and became final on May 7; that the clerk's neglect to comply with Rule 77(d) in the matter of notice does not affect its validity or its finality, and that the notice of appeal of June 14 was consequently out of time and the court below properly dismissed the appeal on that ground. We cannot agree.
>
> "It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. (See Rule 60 (a) (b). These rules do not in terms

apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied upon the provisions of Rule 77 (d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to enter a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause.

"The judgment is reversed and the cause is remanded to the court below for further proceedings in conformity with this opinion."

Two justices dissented, and the dissenting opinion written by Chief Justice Stone presents all of the arguments which could be made in support of the ruling of the Court of Appeals. These arguments were, of course, disallowed by the seven concurring justices. Though the reason for setting aside the order in the case at bar was not based on any omission of the Clerk, the doctrine of Hill v. Hawes supports the discretionary action of the trial court under the rule. In the meantime, Rule 60 (b) has been extended, and liberalized. In the case of *Commercial Credit Corporation* v. *United States,* 175 F. 2d 905, the United States Court of Appeals for the 8th Circuit, followed the doctrine of Hill v. Hawes, relieving a party of the effect of an order, so as to authorize a review after the time for appeal had expired. See also *K. W. Asizur* v. *Cordillo, et al.,* 175 F. 2d 235.

We have stated above that one provision of Rule 60 (b) may be invoked, even after the expiration of a year. We refer to the language of the rule:

> "* * * or (6) any other reason justifying relief from the operation of the judgment."

This broad provision was successfully invoked after a lapse of four (4) years in *Klapprott* v. *United States,* 335 U.S. 601, 336 U.S. 942, 69 S. Ct. 384. Commenting on the case of *Oliver* v. *City of Shattuck,* 10th Circuit, 157 F. 2d 150, the editor of Barron and Holtzoff's Federal Practice and Procedure states:

> "In the case of Oliver v. City of Shattuck, the Court of Appeals for the 10th Circuit reversed a judgment of the District Court denying a motion for relief from a judgment entered more than six months after the entry of the judgment. Both the trial court and the appellate court recognized that Rule 60 (b) contains a saving provision, the manifest purpose of which is to preserve the inherent power of the courts to entertain remedial actions for relief against judgments, similar to writs of coram nobis, actions in the nature of bills of review and actions for a writ of audita querela.
>
> "In its opinion the Court of Appeals comprehensively and succinctly analyzed the purpose of the rule and demonstrated that a motion to vacate or a motion for relief against the judgment upon equitable grounds may fulfill every function of the common law remedies which are now abolished and superseded by the rule." Vol. 3, p. 272.

> "One of the long recognized grounds of relief from a judgment is an agreement or understanding between the parties which, if observed, would have obviated the judgment, especially if the agreement operated to lull the judgment debtor into security or inactivity, in order that some unconscientious advantage could be taken of him." —Vol. 3, *Freeman on Judgments,* Sec. 1243.

It was probably unnecessary for the trial court to state the reasons why he set aside the order. Since the action taken was not based on a failure of the clerk to comply with Rule 77 (d), the doctrine of Hill v. Hawes, and the later case following it is applicable.

The District Court, with full knowledge of the facts, contentions and agreements of the parties, obtained from extensive discussion and argument not reflected in the record, in his discretion set aside an order overruling a motion for a new trial, the indirect effect and actual purpose of which was to permit two appeals to proceed concurrently. It will not be urged that this was an abuse of discretion. Unless it was an abuse of discretion, the trial court's action should be sustained. *Barron & Holtzoff's Federal Practice and Procedure,* page 253. The amendment of the rules has endeavored to permit a trial court to grant not only such relief as could be granted prior to the adoption of the rules, but to render more flexible the discretionary action of the Court.

We request that action on our petition for certiorari be deferred until the unsuccessful party in the companion case of Deena Artware against the same

defendants, argued before the Court of Appeals on the same day, but not yet decided, has had an opportunity to make a similar application.

Respectfully submitted,

JAMES G. WHEELER,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Attorney for Appellant.